

1927

# Minnesota's First State Supreme Court (1858-1865), and the Introduction of the Code of Civil Procedure

Nahman Schochet

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Schochet, Nahman, "Minnesota's First State Supreme Court (1858-1865), and the Introduction of the Code of Civil Procedure" (1927). *Minnesota Law Review*. 1992.  
<https://scholarship.law.umn.edu/mlr/1992>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# MINNESOTA LAW REVIEW

*Journal of the State Bar Association*

---

VOLUME 11

JANUARY, 1927

No. 2

---

## MINNESOTA'S FIRST STATE SUPREME COURT (1858-1865), AND THE INTRODUCTION OF THE CODE OF CIVIL PROCEDURE

BY NAHMAN SCHOCHET\*

ONE of the greatest benefits a new state can enjoy is a supreme court which in its first years adopts and correctly lays down the rules of the common law, selecting, where these rules conflict, those which experience has shown to be sound and those which are best fitted to the people of the state.<sup>1</sup> Minnesota may be listed as one such fortunate state. Minnesota was fortunate in that the foundations of her jurisprudence were laid down by such men as Emmett, Atwater, and Flandrau,—“men of the people, familiar with their struggles, in sympathy with their aspirations, and yet instructed in the mistakes of the past and in the principles whereby like errors could be shunned.”<sup>2</sup> Minnesota's early judges were, without exception, men of character, ability, and adequate learning in the law.<sup>3</sup> Their good work has prevented much injustice, uncertainty in the decisions of the courts, and has minimized unnecessary litigation and legislation.

This paper deals with Minnesota's first state supreme court, 1858 to 1865, treating the personal background as well as some phases of the court's legal work. The judges sketched are Chief Justice Lafayette Emmett, Associate Justice Isaac Atwater, and Associate Justice Charles Eugene Flandrau.

The development of civil procedure is also traced, starting with the territorial practice, through 1866, by which time Minnesota had installed a civil practice patterned after the New York Code of Procedure of 1848.

---

\*Student, Law School, University of Minnesota.

<sup>1</sup>Lightner, 10 Minnesota Historical Society Collections 821.

<sup>2</sup>99 Minn. xviii.

<sup>3</sup>99 Minn. xxi.

## THE CONSTITUTIONAL CONVENTIONS OF 1857

On February 26, 1857, the national Congress passed "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on an equal footing with the original states." In accordance with the provisions of this enabling act and an act passed by the territorial legislature in its special session that spring, the election of members for a constitutional convention was held on June 1, 1857.<sup>4</sup>

Of these delegates, the majority belonged to the newly organized Republican party.<sup>5</sup> As the election returns were not properly canvassed, it was impossible to ascertain the popular majority. The Democrats claimed to have received a popular majority of over 1600 votes throughout the territory.<sup>6</sup> This may have been possible, since the Democrats were strong in the large towns, where a high percentage of the voters participated, while the Republicans were strong in the agricultural districts, where the vote cast was much lighter. Fifty-eight Republicans received certificates of election, as contrasted with only fifty Democrats. In the convention meetings, the Republicans had fifty-nine delegates, and the Democrats had fifty-five members.<sup>7</sup> Owing to the irregularities of the election, many seats were disputed, and both parties planned to capture the organization of the convention.

On July 13, 1857, the delegates met at the specified place, the hall of the house of representatives. C. L. Chase, a Democrat, and J. W. North, a Republican delegate, proceeded simultaneously to call the convention to order. While the Republicans managed to elect a temporary president, the Democrats moved to adjourn and acted accordingly.<sup>8</sup> The Republicans remained in session the first day. At noon of the next day, July 14, Secretary Chase appeared at the entrance to the hall, and demanded possession of the hall "for the use of the constitutional convention."<sup>9</sup> Balcombe, president of the Republican body, refused, answering that that body was already in possession of the hall. Some Democrat then moved that they use the council chamber, which was in the west

---

<sup>4</sup>Minn. Laws, extra sess. 1857, ch. 99.

<sup>5</sup>Neill, *History of Minnesota* 626.

<sup>6</sup>Smith, *Minn. Debates and Proceedings of the Constitutional Convention* 17. (Democratic Wing).

<sup>7</sup>Anderson and Lobb, *History of the Constitution of Minnesota* 75.

<sup>8</sup>Moran, 8 *Minn. Hist. Soc. Col.* 168.

<sup>9</sup>*Democratic Debates* 3-4; *Andrews Republican Debates* 28.

end of the old capitol building. There the Democrats organized, under the presidency of H. H. Sibley, and there they continued to hold their meetings. Each of the two bodies claimed to be the only legitimate constitutional convention, each denounced the other as being responsible for the split, and each proceeded to draft a separate constitution.

The difference in the personnel of the two bodies must be noted. The majority of the Republican delegates were newcomers in the territory, with very little experience in its governmental affairs. The Democrats, on the other hand, had a large number of delegates who were early arrivals in the territory, and had considerable experience in public affairs. A number of the Democratic group were public officials, while there seemed to be none among the Republicans. "The discussions in the Republican convention . . . showed that the members had less grasp of the problems of state government as well as of methods of parliamentary procedure than had the Democrats."<sup>10</sup>

In a Minnesota supreme court decision of 1864, Chief Justice Emmett wrote:

"The whole article on the judiciary, which was adopted by the joint committee of the two conventions, and which now forms the sixth article of the constitution, is, with the exception of the tenth section, identical with that which was passed by the convention over which Mr. Sibley presided; and we must look, therefore, to the debates in this convention, rather than the other, for light in regard to the meaning and intent of this article."<sup>11</sup>

For this reason the work of the Democratic convention in regard to the supreme court will be emphasized more than that of the Republican convention.

On July 29, the fourteenth day of the Democratic convention, Sibley appointed committees to start work on the constitution. The members of the committee upon the judicial department were Sherburne, Meeker, Wait, Emmett, Flandrau, Day, and Burwell.<sup>12</sup> On August 10, the twenty-fourth day of the convention, the committee submitted its report, which was signed by Sherburne, Meeker, Flandrau, Wait, and Burwell. The report provided for a supreme court of three judges, serving for seven year terms, nominated by the governor, and appointed by him, by and with the advice and consent of the senate.<sup>13</sup> The report was

<sup>10</sup>Anderson and Lobb, *op. cit.* 89.

<sup>11</sup>Crowell v. Lambert, (1864) 9 Minn. 292.

<sup>12</sup>Democratic Debates 119.

<sup>13</sup>Ibid. 489.

tabled until August 14, when the convention resolved itself into a committee of the whole on the judicial article. The one important action of the body on the supreme court was initiated by Lafayette Emmett. Emmett moved to amend the article by striking out section 3 ("The Governor shall nominate, and by and with the advice and consent of the Senate, shall appoint the Supreme Judges, whose term of office shall be seven years"), and substituting the following:

"The judges of the supreme court shall be elected by the electors of the state at large, and their term of office shall be seven years and until their successors are elected and qualified."<sup>14</sup>

The section 3 in the report was a compromise section, and because of its appointive feature, Emmett had not signed the report, while Flandrau had signed the report making exception to this section and to one other. Emmett said:

"It was our intention to have submitted a minority report, but owing to certain circumstances, we have not been able to do so. I think that the great principle of an elective judiciary will meet the hearty concurrence of the people of this state, and that it will be entirely unsafe to go before any people in this enlightened age with a constitution which denies to them the right to elect all the officers by whom they are to be governed."<sup>15</sup>

Flandrau supported him, saying:

"It has become the settled rule throughout the states which have revised their constitutions within any recent date, to provide for an elective judiciary."<sup>16</sup>

The supporters of an appointed judiciary stressed the independence of such a court from political parties. Emmett replied:

"We hear a great deal of talk about an independent judiciary. What does it mean? Independent of whom? Independent of the people? . . . If the people are incapable of selecting their judges, they are also incapable of selecting the man who is to appoint their judges."<sup>17</sup>

The convention approved of Emmett's amendment, and adopted it.<sup>18</sup> The committee report provided a seven year term for the supreme court judges. Some favored changing this to ten years, and having the judges ineligible for reelection. This amend-

<sup>14</sup>Ibid. 493.

<sup>15</sup>Ibid. 494.

<sup>16</sup>Ibid. 495.

<sup>17</sup>Ibid. 503.

<sup>18</sup>It is interesting to note that the elective feature was adopted mainly because of the work of Flandrau and Emmett, who were later elected members of the first state supreme court.

ment was rejected. Flandrau moved for a six year term, the judges to be eligible for reelection, but later withdrew this amendment. Chase suggested a six year term for the judges, one judge to be elected every two years, "to secure Judges of different politics by having them chosen at different times."<sup>19</sup> Flandrau declared himself in favor of Chase's amendment, while Emmett was opposed to it. The amendment was voted down. On August 15, the report of the committee on the judiciary was adopted by the convention, as amended.

Now let us turn to the Republican convention. On July 20, President Balcombe appointed Wilson, Galbraith, Billings, North, McClure, Stannard, and McCann, as the standing committee on the judiciary department. Their report was submitted on August 5. On August 8, the convention resolved itself into a committee of the whole upon the judiciary article. The report provided for a supreme court of three judges, serving for nine years, one of the judges to be elected every three years. No important amendment was added that effected any change in the structure or jurisdiction of the state supreme court. The article, as amended, was adopted on August 21, 1857.<sup>20</sup>

On August 8, Moses Sherburne brought before the Democratic body a compromise resolution to unite the work of the two bodies. After a heated debate the resolution was indefinitely postponed.<sup>21</sup> On August 10, Thomas J. Galbraith introduced a similar resolution in the Republican wing, which was adopted unanimously. President Balcombe immediately appointed Galbraith, McClure, Stannard, Aldrich, and Wilson, on the conference committee.<sup>22</sup> Balcombe communicated with Sibley, informing him of the resolution adopted by the Republicans. Sibley presented the question to the Democrats, who, on August 18, voted to have him appoint a similar conference committee. Sibley named Gorman, Brown, Holcombe, Sherburne, and Kingsbury, as constituting the Democratic committee.<sup>23</sup> The conference committees started work immediately, on the afternoon of August 18. The result of their long sessions was reported to the Democrats on August 27, and adopted by them on August 28. The report was submitted to the

---

<sup>19</sup>Democratic Debates 115.

<sup>20</sup>Republican Debates 68, 69.

<sup>21</sup>Democratic Debates 350-51.

<sup>22</sup>Republican Debates 410-11.

<sup>23</sup>Democratic Debates 523.

Republican body on August 28, and adopted on the same day.<sup>24</sup> In this way one constitution, instead of two constitutions, was presented to the people of the territory for ratification. Two constitutions were prepared, of the same wording, one was signed by fifty-one Democrats, and the other by fifty-three Republicans.<sup>25</sup>

On October 13, 1857, the voters of the territory adopted the constitution almost unanimously, 30,055 voting for it, and only 571 opposing it. On January 11, 1858, President Buchanan received a copy of the Minnesota constitution, and submitted it to the senate. The bill for admission, after much delay, was finally passed by both houses, and was signed by the president on May 11, 1858.<sup>26</sup>

The constitution, as adopted, provided for a state supreme court of three justices, elected by the electors of the state at large, and serving for seven years. The supreme court was given "original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and equity."<sup>27</sup> Section 26 of article six ran in part: "The judges . . . shall be men learned in the law."

With the exception of section 10 of article six, which provided for the governor appointing judges to complete unexpired terms, the judiciary article was entirely the work of the Democratic part of the convention.<sup>28</sup>

"A perusal of the Republican plans for the judicial department brings out clearly that the Republicans had no very consistent plan of organization and that in many particulars what they proposed was different from the scheme of judicial organization actually adopted. . . . It was very clear that the Republicans had not studied the problems of judicial administration as long and as carefully as had some of the Democrats. It was, therefore, to be expected that the compromise committee would accept the Democratic proposals."<sup>29</sup>

#### ELECTION OF THE FIRST SUPREME COURT JUDGES

Section 16 of the schedule attached to the constitution provided for the submitting of the constitution to the electors on the

<sup>24</sup>Anderson and Lobb, *op. cit.* 98; Democratic Debates 597-615; Republican Debates 565-83.

<sup>25</sup>Anderson and Lobb, *op. cit.* 276-77.

<sup>26</sup>*Ibid.* 133-38.

<sup>27</sup>Minn. Constitution Article 5, Sec. 2.

<sup>28</sup>Crowell v. Lambert, (1864) 9 Minn. 283 (267).

<sup>29</sup>Anderson and Lobb, *op. cit.* 122-23.

second Tuesday in October, the thirteenth, at which time the people were also to vote for state officers and congressional representatives.

The Democrats carried the election. Lafayette Emmett was elected chief justice of the state supreme court, defeating Horace R. Bigelow by 996 votes out of a combined total of 35,000 votes. Isaac Atwater, with 18,199 votes, and Charles Eugene Flandrau, who had 18,110 votes, defeated the Republican candidates Berry and Billings for the positions of associate justices, the Republican candidates polling 17,052 and 17,026 votes respectively. Thus Minnesota's first state supreme court consisted of three Democrats, Chief Justice Lafayette Emmett, and Associate Justices Isaac Atwater and Charles Eugene Flandrau.<sup>30</sup>

It is interesting to note how the successful candidates were estimated. The following remarks are taken from the editorial columns of the *St. Paul Pioneer and Democrat* for September 19, 1857.

"Mr. Lafayette Emmett, our candidate for chief justice, is well known in this city, not more however, by his intellectual qualities, than for his personal popularity, based upon those genial and generous attributes which ever distinguish the true gentleman. He is a ripe scholar, a studious lawyer, and a man against whose integrity the tainted breath of slander has never been raised."

Concerning Atwater: "As a lawyer, he is known as one of the most acute and well-read in Minnesota. . . . He is one of the most vigorous writers in the Northwest, and we have sufficient professional pride to predict, that a man who makes as good an editor as Mr. Atwater, will not certainly make an indifferent judge. His election is certain. . . . Mr. Flandrau is a young man, with an old and a wise head. As a lawyer, he has few superiors in Minnesota; and if elected, will add dignity and learning to our supreme bench."

The same paper, perhaps the leading Democratic organ at the time in the northwest, though bitterly criticising most of the Republican nominees, said: "For supreme judges, the Republicans have nominated three very respectable candidates."<sup>31</sup>

#### LAFAYETTE EMMETT

Lafayette Emmett, the new chief justice, was born in Mount Vernon, Ohio, on May 18, 1822. He was of Scotch-Irish de-

<sup>30</sup>Official results as determined by the canvassing board, see the *St. Paul Pioneer and Democrat*, and the *Daily Minnesotian*, for Dec. 19, 1857.

<sup>31</sup>*St. Paul Pioneer and Democrat*, September 12, 1857.



scent. His grandfather served in the revolutionary army under General Morgan, and his father participated in the War of 1812, under General Cowpers. Emmett early decided to make law his life work; when seventeen, he entered the office of Columbus Delano, later secretary of the interior. He was admitted to the Ohio bar in 1843, and in 1846 was elected prosecuting attorney for Knox county, serving for one year. In 1849 he married Miss Elizabeth Ball, of Mount Vernon.

Soon after coming to Minnesota in 1851, Emmett opened a law office in partnership with H. L. Moss; he continued to practice as a member of that firm until he was elected chief justice in 1857. From 1853 to 1858 Emmett was attorney-general of the territory, being appointed by Governor Gorman.<sup>32</sup> In the latter half of the fifties he became recognized as one of the territory's leading lawyers. Emmett excelled as a counsellor rather than as an advocate in jury work; he was neither aggressive nor forceful, but was always calm and self-possessed, deliberate and scholarly. His uniform courtesy and most attractive personality made friends of all with whom he came in contact. "He was a man of good character, good education, and of exceptionally fine presence and engaging manners."<sup>33</sup>

Emmett was one of the most active members of the Democratic constitutional convention in 1857, prominent in its debates, and on several minor committees, as well as a member of the committee on the judicial department. Emmett was the one who prevailed upon the Democrats to provide for an elected rather than an appointed judiciary. His work as attorney-general of the territory, his engaging personality, and active partisan work made him the logical candidate of the Democratic party for chief justice of the supreme court. He was recognised as a man of liberal views, agreeable to his party, and respected by the people,—quite an ideal candidate.

On October 13, 1857, at the first state election, Emmett defeated the Republican candidate for chief justice. Emmett polled 18,169 votes, while H. R. Bigelow received 17,173 votes. Emmett thus became chief justice of Minnesota's first state supreme court when thirty-five years old. He may be pictured as a slender, clean-shaven man, slightly above medium height; an "undemonstrative, unassuming, but genial gentleman."<sup>34</sup>

---

<sup>32</sup>13 Nat. Encyc. of Am. Biography 71.

<sup>33</sup>97 Minn. xvii.

<sup>34</sup>1 Newson, Pen Pictures of St. Paul 330.

For seven years after his judgeship, 1865-1872, Emmett practiced in the city of St. Paul. Records left of the time depict him as a social entertainer rather than as a leading barrister. In 1872 he moved to Faribault, where a number of leading lawyers resided, but did not do well there. His practice dwindled steadily, and at times he seemed to be in dire need. In fact, at one time during his residence in Faribault, the other local members of the legal profession were about to gather a collection among themselves for Emmett's benefit. That this was at all necessary, is surprising, for numerous other lawyers, less gifted and less likeable than Emmett, were at that time building the foundations for sizable fortunes which even today are the bases for family estates. While in Faribault, Emmett ran for a state senatorship. Although an Irishman, and very friendly, still the Irish vote in several of the neighboring townships defeated him, electing his opponent, Judge T. S. Buckham.

In 1878 Emmett moved to Ortonville. No records can be found of his activities here. But it may be conjectured that he continued to follow the path of least resistance, inasmuch as he was not heard of again as a lawyer of prominence. It would not have taken very much effort on the part of a man as able as was Lafayette Emmett, to have left a greater impression on Minnesota's legal history.

In 1885, Emmett moved to Las Vegas, New Mexico, where one of his daughters married McGill Otero, then governor of New Mexico. He died in Santa Fe, on August 11, 1906.

#### ISAAC ATWATER

Isaac Atwater was born in Homer, Cortland county, New York, on May 3, 1818. His parents were from Connecticut, and were of English extraction. Isaac was the ninth of a family of eleven children; raised upon his father's farm, it was expected that he would follow farming. By the time he was sixteen he had gained about all he could from the three months' winter terms at the public school. He then prepared himself for college at Cazenovia, and at the Homer Academy, at the same time teaching to obtain money for further studies. In 1840 he entered Yale College, graduating in 1844. Immediately thereafter he taught for a year in Macon, Georgia, returning to study in the Yale Law School for eighteen months.

Atwater was admitted to the bar of New York City in 1847, and started to practice in the following year. He was immediately successful, but suffered because of ill health; his physician constantly advised him to seek a change of climate. In 1849 he married Miss Permelia A. Sanborn, of Geddes, New York. In the following year, 1850, they moved to Minnesota, settling in St. Anthony Falls. For the following year Atwater was associated in a law office with John W. North; opening his own office in 1851. He was now also editor of the *St. Anthony Express*. At that time Atwater was a Whig, and the *Express* strongly supported the Fillmore administration. "Mr. Atwater's able pen . . . made the *Express* second in influence to no paper west of Chicago."<sup>35</sup>

Atwater was on the first board of regents of the University of Minnesota, being appointed by the territorial legislature in 1851. He was secretary of the board until 1857, when he resigned. In March of 1852, Governor Ramsey appointed him reporter of the decisions of the territorial supreme court, and in the following year he was elected county attorney for Hennepin county. His increasing professional business now forced him to resign from his position as editor-in-chief of the *St. Anthony Express*. In 1856 he left the Whig party and became affiliated with the Democrats.<sup>36</sup>

In contrast with Emmett and Flandrau, Atwater was not a member of the constitutional convention. He was, however, unanimously nominated as one of the Democratic candidates for associate justice in their nominating convention of September 15.

Of the three judges-elect, Atwater was the oldest, though only thirty-nine when elected. He was acknowledged to be one of the most prominent men in the state. He was a classic writer and a ready speaker, an outstanding journalist as well as lawyer.<sup>37</sup>

Before he was elected to the supreme bench, he had in the course of business loaned many thousands of dollars for eastern parties on landed security in Minnesota. The 1857 financial panic destroyed all real estate values, and rendered the payment of these loans an impossibility. As Atwater had not guaranteed the loans, he was in no way responsible to the creditors. The latter clamored for their money, and rather than have his judg-

---

<sup>35</sup>Stevens, *Personal Recollections* 107.

<sup>36</sup>*Ibid.* 292.

<sup>37</sup>8 *Magazine of Western History* 254 on.

ment criticised, the judge offered to allow them to select from his private securities amounts equal to their claims, or to give them his notes. They all accepted his notes, which left him with very large outstanding obligations. At that time Nevada Territory was in bad need of experienced lawyers, and promised especially large returns for professional services. Friends of Atwater's informed him of conditions there, and asked him to move. With the purpose of making money to meet his self-assumed obligations, Atwater resigned from the state supreme court in 1865, and moved to Carson City, Nevada. Meeting with immediate success, he wrote to Flandrau, asking the latter to join him in Nevada, and Flandrau also resigned and moved there. After two and a half years, Atwater was able to pay off all of his notes. His goal for settling in Nevada gained, he then returned to Minnesota.

In 1867 he was again joined by Flandrau, and for four years they practiced as "Atwater and Flandrau." Late in 1870, Flandrau moved to St. Paul, and Atwater devoted himself largely to public affairs of a municipal and educational character. He was president of the local board of trade for two terms, on the city council for several years, two years as president of that body, and he was also president of the board of education. He was very active in religious affairs. He also helped develop the railroad system of Minneapolis.

In 1884 he was compelled to leave his professional business, because of his many private interests, and the firm was headed by his son, John B. Atwater. He continued his public work until his death. In 1892 he completed his two volume work "The History of Minneapolis," and contributed frequently to magazines and newspapers. He died in Minneapolis, on December 22, 1906, one of the last of the generation that founded the commonwealth of Minnesota.

#### CHARLES EUGENE FLANDRAU

Charles Eugene Flandrau, the third of the new supreme court justices, was the youngest and most adventurous of the three. He was born in New York City, on July 15, 1828. He was descended on his father's side from the Huguenots; his paternal ancestors founded the colony of New Rochelle, in New York. His father, Thomas H. Flandrau, was a lawyer of prominence.

His mother, Elizabeth Macomb, was a half-sister of General Alexander Macomb, who was at one time commander-in-chief of the United States army.

Flandrau was started in the public schools of Georgetown, in the District of Columbia. When thirteen years old, he left school and shipped as a common seaman on a United States revenue cutter, and made several voyages on merchant vessels during the next two years. He returned to Georgetown, but only for a short while, this time going to New York City, where he worked for three years sawing mahogany veneers for cabinets. After this excursion he studied law in his father's office in Whitesboro, New York. Here he received a thorough legal training. The elder Flandrau was a graduate of Hamilton College, had practiced for many years with Aaron Burr, and was admirably equipped to give his son a good legal training. Charles Flandrau was admitted to the bar in 1851, practicing with his father for the next two years.

In 1853, he and his friend Horace R. Bigelow, left New York for the west, coming to Minnesota in November of that year. The two men opened a law office in St. Paul. As their practice was not particularly remunerative, they left their office, Bigelow teaching school in St. Paul, while Flandrau left for the border, settling at Traverse des Sioux, at that time the only settlement in the Minnesota Valley. Flandrau spent that season in exploring the valley and negotiating for the purchase of lands for a group of St. Paul capitalists. For a while following, he was in an office there with Stewart B. Garvice. Flandrau told the story that at that time they engaged in the unusual practice of "attracting the wolf" to their door. Bounties were paid for wolves, and the two men made this profitable by placing a dead pony within easy range of the window of the hut which served as their law office, and they would shoot the wolves as they approached the body of the pony.

For a time, Flandrau held the office of clerk and district attorney for Nicollet county. He was deputy clerk of the federal district court and notary public in 1854, and a member of the territorial council in 1855, resigning before the term ended. In 1856 President Pierce appointed him Indian Agent for the Sioux, which position he held until he became associate justice of the territorial supreme court in July of 1857, being appointed by President Buchanan. Only one general session was held during Flandrau's term, and he wrote no opinions for the court. He

held several terms of the district court, and became noted for the rapidity with which he despatched business.<sup>38</sup>

He was a delegate to the constitutional convention of that year, sitting with the Democratic group, and taking a leading part in the discussions and activities of that body. He was a member of the committee on the judiciary, as well as several minor ones. At the Democratic nominating convention in September, Flandrau was chosen as a candidate for an associate-judgeship, and was successful.

Only twenty-nine years old when elected, he was the youngest of the judges. Although young, he had filled high offices of public trust successfully, and was well known, especially throughout the Minnesota valley. Newson describes him as a "tall, slender, sinewy, dignified, courteous, energetic, polished gentleman, more like a military officer than a civilian." He was well-learned in the law, convincing in his arguments, and an excellent speaker,— "a first-class lawyer and a first-class man."<sup>39</sup>

During his term as judge, in the Indian outbreak of 1862, he played a prominent part in the defence of New Ulm, and so wrote his name indelibly in Minnesota's military history.

After retiring from the state supreme court in 1865, he accepted Atwater's offer to join him in his practice at Carson City, and Virginia City, Nevada. After about one year in Nevada, Flandrau went to Washington on business for the firm. He intended to return to Nevada, because their practice there was already well established and very satisfactory. His family, however, objected to the hardships of frontier life, and in 1866 he entered into a law partnership with Colonel Musser, in St. Louis.

St. Louis did not satisfy Flandrau, who found the region too dull. Meanwhile Atwater had returned to Minnesota, practicing in Minneapolis, and invited Flandrau to join him again, so Flandrau returned to Minnesota before long, joining Atwater again in 1867. That same year Flandrau was elected city attorney of Minneapolis, and in 1868 was named the first president of the local board of trade. In 1870 he returned to St. Paul, and remained in that city thereafter. The membership of the firm he joined, Bigelow and Clark, changed occasionally, but it was firmly established as a leading office.

---

<sup>38</sup>1 Encyc. of Biography of Minn. 187 on; 7 Magazine of Western History 655 on.

<sup>39</sup>1 Newson, Pen Pictures of St. Paul 406.

Several times, Flandrau accepted the Democratic nomination for several state offices. He knew that he would not be elected, but accepted because of his intense party loyalty. It may be noted that his interest and industry aided greatly in preserving the story of Minnesota's early years. He issued a large work treating of Minnesota's history, and a smaller volume, called "The History of Minnesota and Tales of the Frontier." He also contributed a number of important papers to the Minnesota Historical Society's collections. He died in St. Paul, on July 15, 1903, his seventy-fifth birthday, leaving a notable record as statesman, jurist, author, and military commander.

#### COMPARATIVE WORK OF THE JUDGES

The opinions in cases that came before Minnesota's first state supreme court fill eight volumes, volumes 2 through 9 of the Minnesota reports. The total number of majority opinions is 504. Chief Justice Emmett wrote 125 majority opinions, or approximately one fourth of the total. Associate Justice Atwater wrote 161 majority opinions, or approximately one third. Associate Justice Flandrau wrote 218 majority opinions, or 43 per cent.<sup>40</sup>

The cases that came before this court can be divided quite equally into two sections: the first four volumes, 2 through 5, and the second four volumes, 6 through 9. In volumes 2 through 5 there are 257 majority opinions. Of these, Chief Justice Emmett wrote 60 opinions, or 23 per cent; Associate Justice Atwater wrote 75, or 29 per cent; and Associate Justice Flandrau wrote 122, or 48 per cent of the total. There were 38 dissenting votes in these first 257 cases, approximately one for every seven cases. Emmett dissented 33 times, 30 times without written reasons; Atwater dissented 3 times, twice without written reasons; and Flandrau dissented twice, with a written dissenting opinion for one of these two cases. There were 10 supporting opinions (same decision but different reasoning): 3 by the chief justice, 2 by Atwater, and 5 by Flandrau.

Seventy-five, or 30 per cent of the opinions in the first four volumes (2 through 5) were without any citations or references of any kind to commentaries, texts, dictionaries, or judicial opinions of any court. Of these 75 opinions without citations, Em-

---

<sup>40</sup>In 97 Minn. xxxi, the following figures are given: Emmett 124; Atwater, 158; Flandrau, 217; with a total of 499 opinions for these three judges.

mett wrote 34, Atwater wrote 12, and 29 were written by Flandrau. Forty-three opinions, or one out of every six, contained references only to previous decisions of the same court; 11 in this group were from the pen of the chief justice, 7 by Associate Justice Atwater, and Associate Justice Flandrau wrote 25 such opinions. Each judge wrote one opinion which included a reference only to decisions of the Minnesota territorial supreme court. In 9 cases, or approximately one out of every thirty, one of the judges did not sit: Emmett, six times; Atwater, twice; and Flandrau once.

Carrying this statistical analysis into the second group of volumes of opinions written by this court; volumes 6 through 9 contain 247 majority opinions written by Justices Emmett, Atwater, and Flandrau. The chief justice wrote 65 opinions, or 26 per cent; Atwater wrote 86 opinions, or 35 per cent; and Flandrau wrote 96 opinions, or 39 per cent of the majority opinions in the second half of the court's work. There were only 8 dissenting votes in this group; three by Emmett (one without written reasons), three by Atwater, and two by Flandrau. One supporting opinion, written by Flandrau, is included in these volumes.

Fifty-eight, or 23 per cent of the opinions in the last four volumes were written without the inclusion of any citations or references: 26 by Emmett, 16 by Atwater, and 16 by Flandrau. Sixty-five opinions, or one out of every four, contained citations exclusively from previous decisions of the same court.

Returning to the figures based upon all of the cases, it seems clear that the work of writing the opinions was rather unevenly divided between the judges (majority opinions total 504: Emmett wrote 125, Atwater 161, and Flandrau 218). In volume 1, Associate Justice Flandrau wrote 25 out of the 47 opinions. Of the 65 opinions contained in volume 3, Flandrau wrote 34. In volume 4, the same judge wrote 39 out of the 79 opinions in that volume. Only in volume 9 does Flandrau's total appear to be smaller than his fair share, but there the appearance is deceiving, as both he and Atwater did not finish their terms.<sup>41</sup> Flandrau's smallest comparative contribution toward the opinions in any of

---

<sup>41</sup>In volume 9, the opinions were written as follows: Emmett 16; Atwater, 11; Flandrau, 10; Wilson, 7; McMillan, 9. Judges Wilson and McMillan finished the terms of Judges Atwater and Flandrau, and continued to serve in the next court. Their records would be more properly studied in connection with a survey of the succeeding court, and are therefore not taken up here.



the volumes (excluding volume 9), is in volume 7, where he wrote 25 out of 68 opinions. Throughout his term Flandrau did more than his share of this part of the court's work. Of the 505 opinions here considered, Chief Justice Emmett and Associate Justice Atwater together wrote 286, while Associate Justice Flandrau alone wrote 218 majority opinions.

Associate Justice Atwater travelled the middle road, averaging 32 per cent of the opinions. His lowest average (excluding volume 9), is in volume 3, where he wrote one out of every four cases, or 17 out of 65. His highest comparative number of opinions is found in volume 8, where he wrote 39 per cent of the cases, or 33 out of 85.

The chief justice, Lafayette Emmett, wrote the smallest number of majority opinions. In volume 2 he wrote only 8 out of 47 opinions, or approximately one out of every six. His best record (excluding volume 9), is in volume 5, where he wrote the opinions for 19 out of 66 cases, or 29 per cent of the total number of majority opinions contained in that volume.

#### THE CITATIONS USED 1858-1866

To examine the citations employed by our present state supreme court, to discover the main sources of their practice, would very likely have but little meaning. For today, at least as compared with seventy years ago, the greater part of questions of law have been worked out. Citations for present day decisions might very well come from a number of different jurisdictions. But the situation in the first years of Minnesota's statehood was very different. At that time the code of procedure had but recently been adopted, and pleading and practice were in a transitional state. The lawyers of the period had been trained in different states, and each of the older states had its own precedents and line of decisions. These were often conflicting, and Minnesota had as yet uniformly followed none of them. The territorial bench had not left a systematic body of precedents to be followed by succeeding courts. A beginning had to be made in establishing precedents for the cases presented, and some older systems followed, at least in part. In many cases it was of more importance that the law be definitely settled than examining the principles adopted in settling it.<sup>42</sup>

---

<sup>42</sup>Atwater, 7 Magazine of Western History 659.

"The state was new; the administration of justice was in rather a chaotic condition, and many of the important constitutional questions that came before the court for decision had to be determined upon first impression and without guiding precedent, which rendered the duties of the judges difficult and unusually important."<sup>43</sup>

Although we received our early practice largely from Wisconsin, after the adoption of the code of procedure in 1853, we had to look to New York for guidance in the new system of civil pleading and practice. Until 1848, when Wisconsin became a state, Minnesota had been part of Wisconsin territory. But when the code was adopted in 1853, New York practice and rules had to be referred to, as Wisconsin did not adopt the newer system until some time later. Thus it was that in a majority of the questions presented to the supreme court for settlement in connection with the new system, for which statutes provided only the bare outlines, Minnesota had no precedents in point to refer to.<sup>44</sup> This may be seen more clearly by reference to the state of New York, where almost every session of the state legislature resulted in additions to, and elaborations of the first statutes introducing code pleading. In view of these facts, considerable importance may be placed upon Minnesota's dependence upon outside courts and practices, and this can be traced through several different procedures: (1) tracing the citations and references in the court's opinions, (2) determining the practice prior to and during the first years of Minnesota's statehood, (3) investigating the character of the population, and more especially, the leaders of the legal profession, (4) seeing which state's practice (if any) the legislature followed in framing the judicial statutes, (5) considering where the supreme court judges received their training, and more especially, those judges who were most active in the court's work.

As noted elsewhere, 133 opinions, or 26 per cent of all of the opinions written by Judges Emmett, Atwater, and Flandrau, were without any citations or references to commentaries, texts, dictionaries, or judicial opinions of any court. This is a considerable proportion, one fourth of the cases apparently decided without definite references to previous practices of their own court or any other court. This may be construed a number of different

<sup>43</sup>Flandrau, 8 *Magazine of Western History* 258.

<sup>44</sup>From interviews with Judge T. S. Buckham, who practiced before the state supreme court in this period.

ways: it may be interpreted as showing the lack of a good reference library, as indicating the independence of the court, or as showing the necessity that then existed for introducing a new practice better adapted to the needs of a new middle-western state.

The total number of citations in the opinions of the court is 2677, coming from 269 different sources, which fall into 36 groups. The group classification, with the number of sources in each group, is as follows: Alabama, 1; Arkansas, 1; California, 1; Connecticut, 2; Florida, 1; Illinois, 3; Indiana, 4; Kentucky, 6; Louisiana, 2; Maine, 2; Maryland, 5; New Hampshire, 2; New Jersey, 2; North Carolina, 5; New York, 25; Ohio, 2; Pennsylvania, 6; South Carolina, 5; Tennessee, 3; Texas, 2; Virginia, 3; Vermont, 1; Wisconsin, 2; Minnesota, 2; United States (including commentaries federal in scope), 50; England, 111; texts or commentaries, 50; dictionaries (4 law), 5; bible, 1; France, 1; Ireland, 2; Roman, 1.

The above figures are based upon the number of sources, but are not an accurate guide, because each reporter is listed as a separate source. The totals of the actual references to the state reports and other sources follow: Alabama, 8; Arkansas, 3; California, 10; Connecticut, 29; Florida, 1; Illinois, 10; Indiana, 8; Kentucky, 28; Louisiana, 1; Maine, 20; Maryland, 14; Michigan, 6; Missouri, 16; Massachusetts, 86; New Hampshire, 9; New Jersey, 2; North Carolina, 14; Ohio, 10; Pennsylvania, 53; South Carolina, 11; Tennessee, 7; Virginia, 5; Vermont, 15; Wisconsin, 11; Minnesota, 404; New York, 1089; England, 381; United States, 366; dictionaries, 18.

First, let us note the foreign references. There is one lone reference to the Bible; Associate Justice Flandrau, in the well known case of *Mason v. Callender*,<sup>45</sup> starts his historical treatment of the question with a reference to the rule concerning usury stated in Deuteronomy. The same opinion contains also a reference to the Irish volume, Schoales and Lefroy.<sup>46</sup> In the case of *St. Paul v. Kuby*,<sup>47</sup> Atwater referred to a French source, Pothier's Obligations. The reference to Clancy's Rights of Married Women, an Irish volume, was in the opinion for *Tullis v. Fridley*,<sup>48</sup> written by

---

<sup>45</sup>(1858) 2 Minn. 350.

<sup>46</sup>*Selby v. Stanley*, (1860) 4 Minn. 65, 70.

<sup>47</sup>(1863) 8 Minn. 154, 169.

<sup>48</sup>(1864) 9 Minn. 79, 83.

Flandrau. The Roman reference was a citation of a rule from Justinian's Digest, by Flandrau, in *Filley v. Register*.<sup>49</sup>

Citations were made from the opinions of 26 other states of the Union, with 96 separate sources. Twenty-five of these sources were from New York, slightly over one fourth of the total. One out of every eighteen cases contained references only to New York practice and rules; 41 per cent of all of the citations were from New York. The four states referred to most frequently besides New York and Minnesota, were Massachusetts, with 86 references, or 3 per cent of the total; Pennsylvania, with 53 citations, or 2 per cent of the total; and Connecticut, with 29, and Kentucky with 28 references, each being 1 per cent of the total. The remaining state references, as may be seen above, were well scattered among the other states, and may be considered as of little consequence in comparison with the much greater dependence upon the New York practice and decisions.

Three hundred and fifty-six of the 2677 citations were from federal court decisions or from commentaries which were federal in their scope; 381 citations were from English authorities. While there was a total of 111 separate English sources, the United States works numbered 50. The English references were used mainly for questions of common law rules, and in the historical treatment given many of the questions at issue. Thirteen per cent of the citations were from United States authorities, and 14 per cent from English works.

Fifteen per cent of the total, or 404 of the 2677 citations, were from Minnesota; only 3 being citations from the one volume of decisions of the Minnesota territorial supreme court, with the rest consisting of references to previous decisions of the same men in Minnesota's first state supreme court.

The four leading sources for the court's references were (1) New York, (2) Minnesota, (3) England, (4) the United States (including commentaries federal in their nature). These four have a total of 2240 of the 2677 citations; 83 per cent of the court's references were to these four groups.

The table below shows the relative number of references to these four leading groups:

---

<sup>49</sup> (1860) 4 Minn. 391, 396.

Volume, with no. of cits.	New York	Minn.	England	United States	Total
2—316	187, 59%	9, 2.8%	42, 13%	41, 13%	88%
3—369	152, 41%	41, 11%	44, 12%	46, 12%	76%
4—510	166, 32%	59, 11%	115, 22%	67, 13%	78%
5—333	151, 45%	47, 14%	30, 9%	64, 19%	87%
6—431	187, 41%	57, 13%	60, 14%	58, 13%	81%
7—194	60, 30%	77, 40%	14, 7%	26, 14%	91%
8—277	86, 31%	73, 26%	34, 12%	32, 12%	81%
9—247	100, 40%	41, 16%	45, 18%	32, 13%	87%
2677	1089, 41%	404, 15%	381, 14%	366, 13%	2240, 83%

In each volume, excepting number 7, the New York references are more numerous than those in any other group. In four volumes, numbers 2, 3, 5, and 6, the New York citations outnumber the totals of the other groups in the above table. The New York references occur less frequently in the last four volumes, while the Minnesota citations appear more often there than in the first four volumes. Both the English and the United States references appear less frequently in the last four volumes than in the first four, and in approximately the same ratio. The proportion of the New York references is impressive, 4 out of every 10, with one opinion in every 18 containing only New York references.

#### PRACTICE

The American colonies, after their secession from England in 1776, naturally continued their legal practice as before, following the English common law and chancery proceedings and practice. This system of procedure was adopted here as it was at the time of the secession. Important changes and modifications later introduced in England had no direct effect in this country. The demands for reform in common law and chancery practice in England resulted in important changes there in the years 1828 and 1833. These changes did call the attention of our legal profession to the need for reforms in our practice, especially as the new English modifications were not sufficient to meet the situation. The English changes were not adopted in this country, but increasing attention was drawn to the fact that the technicalities of common law pleading were out of due proportion to their value.

The most important objections to the old system were these:<sup>50</sup>

1. It involved an arbitrary and useless distinction between the actions at law and suits in equity;

---

<sup>50</sup>Sunderland, *Cases on Code Pleading* 14.

2. the forms of actions, such as trespass, trover and assumpsit, were surviving remnants of an outgrown system of writs, and the rules which defined their character and scope were technical and largely useless.

3. the formal language of the pleadings tended to obscure rather than disclose the real issues;

4. failure to distinguish clearly between the parties;

5. the technical distinctions between the different kinds of pleas, and the formal requirements in regard to them, were extremely burdensome and frequently resulted in a miscarriage of justice;

6. limitations upon the right to join different causes of actions in the same declaration, and restrictions upon the right to set-off demands, multiplied litigation without any compensating advantages;

7. the strict rules of construction applied to pleadings encouraged technical objections, and often obscured the merits of causes;

8. the system was productive of confusion through the common use of fictions and untrue allegations;

9. by means of broad general issues defendants were enabled to conceal their real defenses;

10. amendments to pleadings were not permitted with sufficient liberality.

In attempting to avoid these serious defects of the old system of procedure, a new system of pleading and practice was devised, called "code pleading." This system, first introduced in the state of New York, in 1848, has since been followed by the majority of the states.

The term "code" is used in several ways in different jurisdictions. Generally, it is any systematic codification of the statutes on a certain subject. A number of states have collected all of their outstanding and unrepealed legislation into "codes." But used in a narrower sense, as in this paper, the term means a statute or group of statutes affecting the subject of pleading, either a transcript, or a modification of the New York code of procedure.

The main features of code pleading, even as practiced today, are embodied in the Field Code of 1848, or as it is more often named, the New York Code of Procedure Act of 1848. The original statute, containing 391 sections, was passed April 12, 1848, and became operative on July 1, 1848. Amended on May 1, 1849, it was still labelled as the "1848 code." Another statute of the

New York State Legislature, approved on July 10, 1851, and going into operation on July 30, 1851, altered the wording of a majority of the sections, and added new ones, to a total of 473 sections. Minor and comparatively unimportant changes were introduced in 1852 and in following years, but for the basis of our comparison, in the period covered by this paper, no important changes were effected.

The important changes effected by the code system, from the original New York statute, were three: (1) the abolition of the distinction between actions at law and suits in equity, and of the forms of legal actions; (2) the use of the equitable, instead of the legal theory of parties; (3) a simplification of the general rules of pleading, allowing a union of causes of action in the same complaint or petition, a more simple manner of stating the cause of action, and changes in regard to denial, new matter, and counter-claims. These new rules applied to all actions, now termed "civil actions," and were, so far as practicable, an adaptation of the equitable rather than the legal rules and principles, especially in reference to the parties, the pleadings, and to the form and character of the judgment. These fundamental principles are practically the same in all code jurisdictions, although there are endless varieties of detail in matters of practice. "In adjudicating upon these most important matters, the courts of the various Code states have, with a remarkable unanimity, substantially reached the same conclusions."<sup>51</sup>

From 1836 until 1848, when Wisconsin became a state, Minnesota had been a part of Wisconsin territory. The practice of that period was that of the common law and chancery systems, as derived from England, modified in some respects by statutes and rules of the courts. Wisconsin became a state in 1848, and in 1849 Minnesota was declared a separate territory. The common law practice continued, with the addition of such statutes and rules as were needed for better adaptation to the local conditions.<sup>52</sup>

In 1849, the territorial legislative assembly of Minnesota passed a bill providing for the preparation of a code of laws for the territory. Governor Ramsey, however, disapproved of the bill on grounds of economy, thinking that too many commissioners were provided for, and the matter was dropped for the time.<sup>53</sup>

---

<sup>51</sup>Pomeroy, *Remedies and Remedial Rights*, 2nd Ed. 27.

<sup>52</sup>1 Shipman, *Civil Procedure—Minnesota* 2.

<sup>53</sup>Minn. Territory, 1849 House Journal 61, 124, 170.

In 1850, the acts of the first legislative assembly were published. The volume included those important general laws of Wisconsin which were in force in Minnesota territory by provision of the organic act.

In his 1851 message, Governor Ramsey recommended a revision of the laws. The assembly passed a joint resolution authorizing the joint judiciary committee of the two houses to appoint several commissioners to revise and compile the laws. Three commissioners were appointed, L. A. Babcock, William Holcombe, and M. S. Wilkinson. They were handicapped in their work, and not all of them could work together all of the time, but they finished their work in time to have it acted upon by the same legislature. Their work was carefully considered by the assembly, approved by them, and received the approval of the governor on March 31, 1851. These revised statutes of 1851 include the basis of our code. Section 1, page 330, reads:

"The distinction between the forms of actions at law, heretofore existing, are abolished; and there shall be in this territory hereafter, but one form of action at law, to be called a civil action, for the enforcement or protection of private rights, and the redress of private wrongs, except as otherwise expressly provided by this statute."

Thus the distinctions between the actions at common law were abolished, and the "civil action" introduced as the one form for a civil legal action; chancery suits were still distinguished from actions at law. An editorial comment of two years later, perhaps the only local editorial comment on this important change, read:<sup>54</sup>

"When we reflect that our entire code was compiled and perfected during that session (1851), under many disadvantages, arising from a want of copies of the statutes of other states, and the difficulty of adapting the laws of a state densely populated, to suit the wants of our sparsely settled Territory, we have reason to be highly gratified, yes, proud of the legal attainments of the committee more especially charged with the revision."

The one important change left was to abolish the distinctions between chancery proceedings and actions at law. To this effect, a bill was introduced before the council, by Babcock, on February 7, 1853. The bill, approved on March 5, 1853, was entitled: "An Act to authorize the exercise of all equity jurisdiction in the form of civil actions, and for other purposes."<sup>55</sup> Section 1 of the act reads:

---

<sup>54</sup>The Minn. Pioneer (St. Paul, Democratic) for March 10, 1853.

<sup>55</sup>Minn. Territory, Statutes 1853, ch. 9.



"Be it enacted by the Legislative Assembly of the Territory of Minnesota, That all equity and chancery jurisdiction, authorized by the organic act of the Territory, shall be exercised, and all suits or proceedings to be instituted for that purpose are to be commenced, prosecuted, and conducted to a final decision and judgment, by the like process, pleadings, trial, and proceedings, as in civil actions."

Minor changes in some of the statutory specifications were of course introduced at the succeeding sessions of the legislature. By an act passed March 13, 1858, it was provided that Aaron Goodrich, Moses Sherburne, and William Hollinshead were appointed commissioners to revise the statutes, and to report on a code of practice for the state. Two separate reports were made relating to the code of procedure, neither of which was adopted by the legislature. In the joint resolution advising the commissioners of the legislature's purpose and advice relating to a revision of the code, we find this direction: ". . . and to prepare a system of pleadings and practice for the several courts of this State, such system to conform as near as practicable to the present New York Code, and having reference to the brevity and legal intent of the pleadings."<sup>56</sup>

In the majority report of the commission, the work of Sherburne and Hollinshead, we find this statement in the introduction:

"The commissioners were not called upon to speak of the merits or demerits of the New York system of legal practice. It is enough for them to say that it has obtained favor in this state, to a greater or less extent, and that they were instructed to conform substantially to its provisions. These instructions have been followed faithfully."

These two commissioners did state their position, however, as advocating, if a change should be made, an entire change to a modified common law practice.

The introduction to the dissenting report, written by Aaron Goodrich, is most interesting, as expressing the frank opinion of an experienced jurist of the period. In speaking of his own report, he wrote:

"He has retained in this report the essential qualities of the Code while attempting to free it from its most oppressive features. He has sought to infuse into it some of the principles which in other days guided the bar and bench in the pursuit of justice. Neither of these reports come up to his appreciation of right. It

---

<sup>56</sup>Minn. Majority Report of the Commissioners on Pleading and Practice, 1858, preface.

is yet too soon to hope for a return to the purer principles and practice of the common law, yet that day will surely come. Its advent will be hailed by the people of Minnesota with demonstrations of joy such as characterised the restoration of the 'law of their fathers' to the ancient Britons, by the promulgation of Magna Charta. This result must be produced by the wrongs which such codification will ever entail."

Goodrich's main objection was to the accumulation of excessive costs; this was remedied in great part by legislative action during the next few years. He also included in his report under set-offs what otherwise came under both set-offs and counter claims. His other objections are difficult, if not impossible, to discover.

From a letter to Colonel John H. Stevens, from J. Severance, dated July 15, 1858, more sidelight may be obtained on the reception of these reports. From the fact that neither report was accepted, or even modified, nor another and different report called for, it seems reasonable to deduce that there was considerable difference of opinion. The letter reads, in great part:<sup>57</sup>

"I received a few days since a copy of the report of practice by Aaron Goodrich, and one by Hollinshead and Sherburne, and I must say that neither system answers my expectations. With the exception that Goodrich strikes out the fees of attorney, which in my estimation is right, there is no material difference in the reports, and I should naturally think they were drawn by the same man. Both reports follow the New York practice very closely and I cannot see where there is any material difference. I had a conversation at Henderson with Mr. Hollinshead yesterday and he says that the committee were in favor of some practice like the Massachusetts practice, and why they did not present a report to that effect is more than I can see. Hollinshead says that he wrote to several prominent members of the New York bar before he commenced his report, and they all spoke in terms of disfavour of their own practice and are anxious for a new one. . . . At present I am in favour of rejecting both reports and leave things as they are until we can have something better."

When Goodrich's code was presented to the house, it was passed without amendments. In the senate, on its final passage, the vote stood 17 for, and 7 against. As the constitution required a vote of 19 for in the senate for passage of bills, the report failed.<sup>58</sup>

In the next session of the state legislature, 1859-1860, an attempt was made to revert to the common law system without

<sup>57</sup>From Stevens' letters, Minnesota Historical Society Manuscript Department.

<sup>58</sup>Minn. Senate Journal 1859-60, p. 172.

any intermediate steps. On January 14, 1860, two motions to this effect were introduced in the house of representatives. A Mr. Hayes offered the following resolution: "Resolved, That the Committee on the Judiciary be instructed to report a bill to this House establishing the common law practice, with such modifications as may be deemed advisable, and repealing the so-called code of practice." This resolution was approved by a vote of 47 to 14. Next a Mr. Fox introduced a bill to this effect, titled: "A bill to establish a common law practice in the State of Minnesota, and to repeal the code now in force."<sup>59</sup> This bill was referred to the committee on the judiciary.

On January 24, 1860, the house adopted the following resolution, which was introduced by Mr. Fox:<sup>60</sup>

"Resolved, That Aaron Goodrich, James Smith and Lorenzo Allis be appointed commissioners, to act in conjunction with the judiciary committee, to report rules of practice for the government of the courts of this state, conformable to the common law practice and pleadings, and that the said commissioners and committee be requested to reply to this House within eight days."

Meanwhile the committee on the judiciary had worked upon the resolutions of January 14. The bill reported back by the committee had been amended by the house, and returned to the committee. It was finally passed by the house on February 18, 1860, entitled: "An act to define the pleading and practice in this State." In the senate, however, its fate was otherwise. Tabled, postponed several times, it was finally tabled again, and heard of no more.

Even less is to be found concerning the code commissioners and their work. Today, no trace of a report can be found. That they did actually work upon a new code is indisputable, since the session laws for 1860 include provisions for paying the three commissioners appointed according to the house resolution of January 24, 1860, for their work.<sup>61</sup>

Undoubtedly, this agitation for a return to the common law and chancery systems was caused chiefly by the activity of Aaron Goodrich. He submitted a lengthy communication to that effect to the legislature of 1860.<sup>62</sup>

---

<sup>59</sup>Minn. House Journal 1860, p. 270.

<sup>60</sup>Ibid. 320.

<sup>61</sup>Minn. Gen. Laws 1860, p. 208.

<sup>62</sup>Minn. Senate Journal 1860, pp. 168 and ff.; Minn. House Journal 1860, pp. 217-24.

Throughout this agitation for the abolition of the code system of procedure, the system was being simplified by legislative acts, and worked out in practice before the courts.

Judge Flandrau wrote the following of Goodrich:<sup>63</sup>

"Aaron Goodrich . . . was quite an eccentric person, and not particularly eminent as a lawyer. . . . At one time Judge Goodrich, Judge Chatfield, and William Hollinshead, were appointed to compile the statutes from 1849 to 1858. Goodrich got up a code of his own. It was not a compilation at all, but an original code. . . . It got into print, but no further."

It readily can be seen that the practice of that period was necessarily quite mixed. The New York code was a new system, and a radical departure from the older system. "The older lawyers were reluctant to learn its ways, even in its home in New York; but when administered by judges from Tennessee, Pennsylvania, Michigan, Maine, and Kentucky, all of whom were wedded to their own way of doing things and thought they could not be improved upon, the jumble was of course rather amusing."<sup>64</sup>

By an act of the legislature approved on February 17, 1863, S. J. R. McMillan, E. P. Palmer, Thomas Wilson, and Andrew G. Chatfield were appointed commissioners to revise the state statutes, and were directed to submit a report at the 1864 session. A. G. Chatfield declined to serve. The others started at once upon their task. But because most of their time was necessarily occupied by their judicial duties, and because of the magnitude of the undertaking, the work was not completed in the specified time. The commission was continued by the legislature, and required to submit a printed report at the 1865 session. Again they were unable to do so. In 1865 the membership of the commission was changed; on February 2, G. E. Cole was added, and in July, McMillan and Wilson were appointed to the supreme court, to complete the terms of Atwater and Flandrau. In 1866 a report was finally made, and accepted at the same session, and the 1866 revised statutes were published that year.

There were no important changes effected in the code of practice. The phraseology was changed in a number of instances, and minor amendments since the last revision were incorporated into the proper sections.<sup>65</sup>

<sup>63</sup>8 Minn. Hist. Soc. Col. 99.

<sup>64</sup>Flandrau, 8 Minn. Hist. Soc. Col. 100.

<sup>65</sup>Minn. Rev. St. 1866, preface.

## CHARACTER OF THE POPULATION

The character of the population, especially of the professional class, also shows a connection with New York. In the middle of the nineteenth century, Minnesota was still considered as frontier territory. Not until 1880 does it begin to be treated as settled territory. In the fifties, Minnesota succeeded to the place formerly held by Wisconsin, as a most desirable place for settlers.

A general study of the middle west region of that period would most likely lead to the conclusion that the region was a meeting place of northern, southern, and central states. In general, this was also true of Minnesota. But in Minnesota there were also definite connections with certain of the older states. Formerly the region was segregated as the Mississippi valley region, with New Orleans figuring as the chief outlet for middle western products. But the later movement of eastern settlers, building up Chicago, Milwaukee, St. Paul, and Minneapolis, replaced the dominance of the southern element with that of a modified Puritan stock. The early fifties brought a railroad system approaching the Mississippi valley, which bound the region to the north Atlantic seaboard, and New Orleans gave way to New York as the outlet for the middle west. Railway construction and transportation stimulated inter-river settlements. "The change in the political and social ideas was at least equal to the change in economic connections, and together these forces made an intimate organic union between New England, New York, and the newly settled West."<sup>66</sup>

As evidenced by the change in party control in 1859, the Democrats giving way to the Republicans, the control of the middle west, including Minnesota, had by this time passed to settlers from the northeastern states. The largest proportion of the Minnesota settlers came from Wisconsin and from New York,<sup>67</sup> with a considerable number coming from Vermont.<sup>68</sup>

As representative leaders in the legal profession in Minnesota for that period, have been taken the thirty-five lawyers who conducted suits most frequently before the state supreme court between 1858 and 1866. Of these thirty-five, fifteen were trained in New York: C. H. Berry, H. R. Bigelow, J. B. Brisbin, C. D. Gilfillan, James Gilfillan, Henry Hinds, G. L. Otis, I. Van Etten, C. E. Vanderburgh, F. R. E. Cornell, I. V. D. Heard, D. C. Cooley, H. F. Masterson, O. Simons, and A. G. Chatfield. Prac-

---

<sup>66</sup>Turner, *The Frontier in American History* 27-28, 137.

<sup>67</sup>*Ibid.* 147, 237.

<sup>68</sup>From interviews with Judge T. S. Buckham.

tically all of these men practiced in New York after the adoption there of the Field code of procedure. Only one of the group, G. L. Otis, practiced in another state before coming to Minnesota. Seven of these thirty-five lawyers came from Vermont: M. E. Ames, L. M. Brown, J. M. Gilman, H. A. Billings, R. B. Galusha, T. S. Buckham, and G. W. Batchelder. Five came from Pennsylvania: W. Hollinshead, H. J. Horn, Harvey Officer, and the two men who filled out the unfinished terms of Judges Atwater and Flandrau,—S. J. R. McMillan and Thomas Wilson. From New Hampshire came J. B. Sanborn, Morris Lamprey, and D. A. Secombe. W. Sprigg Hall and D. Cooper were from Maryland; G. E. Cole and J. Severance from Massachusetts; and M. Sherburne from Maine.<sup>69</sup>

#### COMPARISON OF THE CODES

By the great number of cases depending upon New York precedents, and by the fact that the New York cases were almost the only authorities for precedents under the new code pleading, it is indisputable that the Minnesota statutes in point were largely modelled after the similar statutes of New York. In the opinion in the case of *Greenleaf v. Edes*, Judge Atwater wrote the following:<sup>70</sup>

"In view of the fact that our code is mostly a transcript from that of New York, and of the advantage to be derived to the profession, as well as to the community at large, from the decisions of the eminent court of last resort of that state, we should long hesitate to differ from a unanimous opinion of that court given upon a point involving the construction of the same statute as our own. In all such cases, it is believed that far less evil would result from applying the rule of 'stare decisis,' even in every instance, rather than regard such decisions as open for discussion, and not binding upon this court."

Again, Judge Flandrau, in the opinion for *Whitaker v. Rice*, wrote:<sup>71</sup>

"The groundwork of our code was that of New York, much of it is merely a transcript; therefore, wherever we find alterations, we must suppose them to be the work of particular design."

---

<sup>69</sup>Two of the judges treated in this paper, Judges Atwater and Flandrau, had practiced in New York before coming to Minnesota, while the chief justice, Emmett, came from Ohio.

<sup>70</sup>(1858) 2 Minn. 264, 274.

<sup>71</sup>(1864) 9 Minn. 13, 19.

Reasoning from these and numerous similar statements in the opinions of the first state supreme court, there can be no doubt that Minnesota followed the New York Code of Civil Procedure.

It should be remembered that when the New York code was adopted, the systems of legal and equitable pleading and practice were united into one system. On the other hand, when the Minnesota code was first adopted, it did not blend the two systems into one, but retained the court of chancery as a distinct tribunal. The change introduced by the revised statutes of 1851 applied only to legal causes of action. By the act approved on March 5, 1853, the court of chancery was abolished, and the two systems blended. After this enactment, the two civil codes, those of Minnesota and New York, were fundamentally the same.

Not all of the provisions of the act of March 5, 1853, were incorporated into the proper sections in the 1859 revision, so for this comparison, the 1866 revised statutes suffice. The only difference between the 1859 and the 1866 revisions, as noted before, is that the latter work is more complete, and has the phraseology changed in a number of instances, also including the minor amendments up to that time. But as regards the basic provisions, the two are essentially the same.

Section 69, page 501, of the 1859 New York Revised Statutes, volume 3, reads:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement of protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

The similar section of the Minnesota Revised Statutes for 1866, reads:<sup>72</sup>

"The distinction between actions at law, and suits in equity and the forms of all such actions and suits, are abolished; and there shall be in this state, but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs; which shall be called a civil action."

This comparison will follow the outline of the basic changes introduced by the New York code: (1) abolition of the distinctions between actions at law and suits in equity, and of the forms of legal actions; (2) the theory of parties; (3) the changes in

---

<sup>72</sup>Minn. Rev. St. 1866, sec. 1, pp. 516-17.

the general rules of pleading. The New York code said of the parties: "The party complaining shall be known as the plaintiff, and the adverse party as the defendant." The 1866 revision of the Minnesota statutes, contained a clause with exactly the same wording.

The conditions under which the defendant may demur, are precisely the same in both codes.<sup>73</sup> In regard to the sections governing the reply, the only difference is in the time limit prescribed.<sup>74</sup> The sections applying to mistakes in pleading and to amendments are substantially the same.<sup>75</sup>

Of more interest are the sections telling how the complaint should be stated. The New York code specified that: "The complaint shall contain a plain and concise statement of the facts constituting a cause of action without unnecessary repetition."<sup>76</sup> The complaint had to contain the title of the action, the court in which the action was originally brought, the names of the parties, and a demand of the relief to which the plaintiff considered himself entitled. The Minnesota 1866 revision included a clause exactly like the one quoted above from the 1859 New York revised statutes.<sup>77</sup> The earlier Minnesota revision, of 1859, however, contained the following section:<sup>78</sup>

"The complaint must contain a statement of the facts constituting the cause of action; in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

This clause contained a key to the reasons for the change in the legal system of procedure. The purpose of the code framers was to simplify pleadings and practice, even "that every man might be his own lawyer." The phrase "in such a manner as to enable a person of common understanding to know what is intended," was accepted by contemporary lawyers as the test of what was demanded. A plain and easily intelligible argument was desired, to replace the highly technical and largely fictitious pleas used under the common law system, where even the literary classics were referred to if legal precedents were lacking or not easily available.<sup>79</sup>

<sup>73</sup>3 N. Y. Rev. St. 1859, p. 144. 2 Minn. Rev. St. 1866, pp. 459-60.

<sup>74</sup>3 N. Y. Rev. St. 1859, p. 518-19; Minn. Rev. St. 1866, p. 461.

<sup>75</sup>3 N. Y. Rev. St. 1859, p. 522-23; Minn. Rev. St. 1866, pp. 463-64.

<sup>76</sup>N. Y. Code Civ. Proc. 1859, sec. 142 (2), p. 516.

<sup>77</sup>Minn. Rev. St. 1866, sec. 73 (2), p. 459.

<sup>78</sup>Minn. Rev. St. 1859, sec. 64 (2) p. 540.

<sup>79</sup>From an interview with T. S. Buckham.



## STATE LIBRARY

The state library of that period seems to call for some comment. It is impossible to speak accurately of the library as a whole, as it was at that time, because the first catalogues and the majority of the reports have been lost, or destroyed by the 1881 capitol fire. No report is available today giving accurate information of the library as a whole. Mention has been made of it, however, in some discussions, and from interviews, more information has been gathered.

To treat of only one report, that for the year ending December 23, 1859, as given in the appendix of the 1859-1860 senate journal, is taken as the basis for the following statistics. This report gives the number and volumes of reports, laws, legislative journals, and executive documents received in that year, and also some figures on the condition of certain sets of books. Such publications were received from 31 states, 2 territories (Utah and Washington), the federal government, and from England, to the total of 529 volumes. These additions included 80 separate volumes of New York reports, 70 from Pennsylvania, 60 from Massachusetts, and 38 from Kentucky. The library also had at that time 56 out of 59 volumes of a set of English common law reports, 20 volumes of a set of 30 volumes of English chancery reports, 41 volumes of a general "English law library," and 67 miscellaneous law books, of both English and American origin. As stated above, the total number of reports, statutes, executive documents, and legislative journals cannot be ascertained. The library at that time also included miscellaneous classics, including 187 volumes of the "family library," Harper's classical literature, and volumes on poetry, drama, fiction, medical treatises, works on science, and newspapers. Originally the library was composed of only a small shelf of miscellaneous books, and apparently visiting lawyers either neglected to return borrowed volumes, or else took them as souvenirs. For a number of years no satisfactory system was arranged, and it was next to impossible for the librarian, for there was such an official all the while, to keep track of the borrowed volumes and have them returned.

From the number of volumes received during 1859, one would naturally believe that there was a considerable collection of worthy legal reference books in the state library, but the actual condition seems to have been otherwise. The Honorable Thomas Scott

Buckham stated in an interview that the majority of the books there were not law books, that the room was disorderly looking, and could hardly have been called a library, as it was not properly taken care of. Judge Atwater, in later years, wrote the following:<sup>80</sup>

"There was at that time no law library for the use of the judges, and we were necessarily much hampered in our work by the lack of that facility. Often we would have brief references to decisions which might be of controlling weight upon a case under consideration, but it was impossible for us to obtain any full report of those decisions. Many cases came before us, especially in real estate and railroad law, which were of first impression, and we were obliged to struggle with the questions presented with practically no aid from the textbooks or prior decisions."

### CONCLUSION

This period, 1858 to 1866, was a most critical one in Minnesota's history. Scarcely was the state governmental system inaugurated when the Civil War started. The political and economic status of the state was not fixed. The close elections of 1859 and 1860, installing a Republican party government, indicated a transition period in politics.

And we were "floundering in an economic morass as a result of an injudicious attempt to build railroads without money, of an orgy of wildcat banking, and of the depression following the panic of 1857."<sup>81</sup> In the midst of the Civil War, Minnesota had to deal with a series of serious Indian uprisings. Because the federal government was too much preoccupied with the Civil War, the state government had to meet the situation as well as it could. Indeed, Minnesota was more concerned at the time with the Indian troubles at home than with the war for the Union. This, briefly, indicates the unsettled conditions of the period covered in this paper.

It is difficult to evaluate with any degree of precision the work of the first state supreme court. To be sure, Minnesota, as a territory, had enjoyed a territorial supreme court. But this group had handed down only a small number of decisions, and its court records were largely lost. With the installation of the state government, the governmental system was better organized, and the people had easier access to the courts, which became used

<sup>80</sup>89 Minn. xxxix.

<sup>81</sup>S. J. Buck, 2 Folwell. History of Minnesota vii.

more and more as fundamental doctrines of law had to be enunciated governing commercial life.

This fact is particularly noticeable concerning the court's work, that the questions were largely either of a commercial nature, or else questions of adjective or procedural law. But few constitutional questions were presented to this court for settlement. The cases involving governmental questions were small in number, and were occupied chiefly with municipal powers and county officers. Commercial law, on the other hand, demanded more immediate settlement. The judges treated in this paper occupied the bench in Minnesota's formative years, when men were concerned largely with commerce and real estate and railroads. These fields of law were necessarily unsettled at that time, and the Minnesota supreme court had the task of selecting fundamental principles from the numerous and varying practices of the older states, and building a consistent body of practice and law in Minnesota. Individuals may disagree as to the individual worth of the judges, but all must agree that as a group they performed their work well, in laying down the basis for the commercial laws of the state.

As above noted, the court was also largely occupied with settling questions of procedure, or difficulties in adjective law. This paper has outlined the introduction and the essential elements of the code of civil procedure which Minnesota adapted from that used in the state of New York. The chief purpose of adopting this system was to simplify the legal machinery, and do away with the fictions, the unnecessarily elaborate and formal petitions evolved by the common law practice. This hope, however, was not realized in the lifetime of these judges. The newer system, designed to simplify proceedings, did away with some of the faults of the older system, but also raised new difficulties. Atwater wrote:

"The only immediate result was, that the new system, for many years, became an inextricable muddle of incongruities, imposing greatly increased labor on the judiciary and from which it has not yet been wholly rescued."<sup>82</sup>

The same judge, in a judicial opinion, wrote the following:

"Correct pleading under the code is, perhaps, more difficult than under the old system. . . ."<sup>83</sup>

---

<sup>82</sup>3 Magazine of Western History 655.

<sup>83</sup>Barnsback v. Reiner, (1866) 8 Minn. 59, 66.

Inspection of code state reports and comparison with those of the common law states will show that there is much more litigation over questions of pleading in code states. This may be ascribed to several reasons: because of the comparative newness of the code system, because of inherent difficulties, and in some part because of the reluctance of various courts to give full force and effect to the changes introduced by it.

Immediately following the introduction of the code system, there developed two schools of thought regarding its position. The first contended that it formed a system complete in itself, and was sufficient in itself without reference to any principles which had been developed by the older system of procedure. The other group advanced the doctrine that the primary object of all pleading was the same, and in view of the great difficulty of a sudden and complete abandonment of the rules developed by common law and equity practice, they freely referred to the older system where necessary. In fact, many of the code statutes made provision for referring to the older systems where the newer procedure was incomplete or too uncertain. This last view was taken by the great majority of the code states, including Minnesota.<sup>84</sup> It may be true that direct references to common law and equity pleading may not be numerous today, but in the early development of the code practice, the older systems were directly referred to again and again in the building up of a code system completely to cover the field.

Judges Emmett, Atwater, and Flandrau did their best to give the code system a fair chance, and saw to it that its provisions were complied with, in the face of rather bitter and continued opposition. They carried this work on so well, that, as continued by their successors, the code system of civil procedure has remained a part of Minnesota legal procedure.

Emmett, the chief justice, was an extremely sociable man, but not a steady worker. Although generally recognized as talented, and blessed with a keen mind, he did not make the most of his opportunities. His record as chief justice proved that he was an able judge, capable of reasoning soundly even where legal precedent was lacking. In the formal in memoriam services held in the state supreme court in memory of Lafayette Emmett, Thomas Wilson said the following of the chief justice of Minnesota's first state supreme court:<sup>85</sup>

---

<sup>84</sup>State v. Pulle, (1866) 12 Minn. 164.

<sup>85</sup>97 Minn. xxviii.

"He was a man of a great deal more than ordinary ability; . . . a man of very exceptional attractive characteristics and personality. The only comment adverse to Judge Emmett that could be made would be that he was a little inclined to be indolent. Had he done his best he would have been a man of mark. . . ."

The later achievements of Judges Atwater and Flandrau do not need elaboration. They were not only brilliant men, but also industrious, and have left enviable records of varied but worthy contributions to Minnesota's progress.

In this paper have been gathered the various threads that would include all of the factors influencing the judiciary of the period treated, including biographical, historical, and the relevant notes of Minnesota's legal history. This study might have been named a "study of the factors influencing a pioneer judiciary," a study of the conditions under which Minnesota's first state supreme court labored.

"Of all men that distinguish themselves by memorable achievements, the first place of honor seems due to . . . the founders of states who transmit a system of laws and institutions to secure the peace, happiness, and liberty of future generations."